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In the Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA, PETITIONER

v.

THOMAS M. GAUBERT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether supervisory actions that are taken by federal regulators of financial institutions and that require the exercise of policy discretion fall within the "discretionary function" exception to the Federal Tort Claims Act, 28 U.S.C. 2680(a), regardless of whether those actions may be categorized as "operational" in nature.

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The Acting Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-20a) is reported at 885 F.2d 1284. The opinion of the district court (App., *infra*, 21a-26a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 17, 1989. A petition for rehearing was denied on January 5, 1990. App., *infra*, 30a. On March 23 and April 27, 1990, Justice White extended the time for filing a petition for a writ of certiorari to and including May 17, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

The Federal Tort Claims Act, 28 U.S.C. 2680, provides in relevant part:

> The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

STATEMENT

This tort action arises out of regulatory activities undertaken by officials of the Federal Home Loan Bank Board (FHLBB or the Board) and the Federal Home Loan Bank-Dallas (FHLB-D), with respect to Independent American Savings Association (IASA), a now-failed Texas thrift institution. Respondent Thomas Gaubert, a major shareholder and former officer of IASA, brought this action under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671-2680. Respondent contends that he suffered personal financial losses because of IASA's failure, and he alleges that this failure was caused by negligence of federal regulators in their supervision of IASA. The sole issue presented for review is whether the court of appeals correctly interpreted the FTCA's discretionary function exception, 28 U.S.C. 2680(a).

1. *Regulatory Background*

The context within which the actions at issue took place is the extensive statutory scheme for the federal regulation of financial institutions. As a state-chartered thrift institution whose accounts were insured by the Federal Savings and Loan Insurance Corporation (FSLIC), IASA

was subject to federal regulation pursuant to Title IV of the National Housing Act, 12 U.S.C. 1724-1730i (1988).[1]

These statutory powers were entrusted to a number of related federal bodies, all under the overall supervision of the Board. The Board itself was an independent agency of the federal government, with broad responsibilities for the regulation of both federally chartered and state-chartered thrift institutions. See 12 U.S.C. 1437 (1988). FSLIC was a corporation that was established by Congress to provide insurance for deposits in both state and federally chartered thrift institutions and that operated under the direction of the Board. 12 U.S.C. 1725(a) (1988). FSLIC operated in two separate and legally distinct capacities—as a federal regulator (charged with protecting the insurance fund against undue risk by examining and regulating insured institutions), and as a receiver of failed institutions. The Federal Home Loan Banks, including FHLB-D, were regional banks established by the Board for the purpose of assisting member institutions. 12 U.S.C. 1423 (1988). The Board supervised the activities of the various FHLBs, and was specifically empowered to assign to the personnel of any FHLB most of the regulatory functions of the Board itself, or of FSLIC. 12 U.S.C. 1437(a) (1988).

The regulatory powers of greatest relevance here are those provided in 12 U.S.C. 1729 and 1730 (1988). Section 1729(c), for example, empowered the Board, under certain circumstances, to appoint FSLIC as the conservator or receiver of an insured institution. Section 1730 conferred a wide range of enforcement authority on

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[1] The regulatory scheme as here described is that in place at the time of the actions at issue, in 1984 through 1986. As discussed below, many of the regulatory functions have been altered or shifted by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183—but not in ways that affect the significance of the ruling below or the need for review. See pp. 20-21, *infra*.

FSLIC, in its regulatory capacity, over state-chartered thrift institutions.[2] For example, Section 1730(b) provided for formal proceedings that could result in the termination of FSLIC insurance. Section 1730(e) provided for proceedings in which FSLIC could issue orders requiring an insured institution to cease and desist from engaging in any practices found either to be in violation of a pertinent statute or regulation, or to constitute an unsafe or unsound banking practice. Section 1730(f) provided for expedited, temporary cease-and-desist orders under certain circumstances. Section 1730(g) provided for the suspension or removal of any officer or director of an insured institution on a number of grounds, including violations of a statute or regulation, or actions in violation of fiduciary duties. Pursuant to 12 U.S.C. 1730(m)(2) (1988), FSLIC also had broad investigatory powers in aid of its regulatory functions.

Not all instances of misconduct or regulatory concern have been handled by institution of such formal proceedings. Like other federal regulators, the Board and FSLIC have often relied on more informal methods of ensuring compliance with regulatory standards. Regulators may, for example, forbear from initiating formal enforcement proceedings in exchange for assurances that regulated parties will refrain from certain conduct or take specified corrective steps. Federal agencies involved in the regulation of financial institutions have turned to such approaches frequently, especially in light of the growing case load confronting those agencies. See generally Vartanian & Schley, *Bank Officer and Director Liability—Regulatory Actions*, 39 Bus. Law. 1021, 1027-1028 (1984). In a policy statement, FHLBB specifically addressed the use of such procedures, noting the appropriateness in many instances of "informal supervisory guidance" or negotiated "supervisory agreement[s]" in

[2] The Board itself directly exercised such authority over federally chartered thrifts, under the analogous provisions of the Home Owners' Loan Act of 1933, 12 U.S.C. 1464 (1988).

lieu of formal regulatory steps. See FHLBB Res. No. 82-381 (May 26, 1982).

2. *Factual Background* [3]

In 1983 respondent acquired a controlling interest in Citizens Savings and Loan Association, a federally insured thrift institution chartered by the State of Texas. A new board of directors (of which respondent was the chairman) changed the name of the institution to Independent American Savings Association and embarked upon a course of substantial expansion. The actions on which respondent's complaint is based began with two interrelated events in early 1984. In May 1984, the FHLB-Des Moines requested the institution of an investigation, pursuant to 12 U.S.C. 1730(m)(2) (1988), of certain operations of Capitol Savings and Loan Association, an Iowa institution in which respondent had had

[3] In granting the motion of the United States to dismiss, the district court did not resolve any disputed factual issues. The background stated here is drawn either from the complaint or from certain exhibits to the motion of the United States to dismiss the complaint that were provided to the district court "for background only." Memorandum in Support of Motion of the United States of America to Dismiss the Complaint 32 n.22 (dated Mar. 17, 1988) (Memorandum to Dismiss). These exhibits included various written agreements between federal regulators and respondent or IASA, a January 1987 FHLBB memorandum recommending the appointment of a receiver for IASA, and an April 1987 report by an independent counsel engaged by FHLBB to look into allegations by respondent of misconduct by personnel of FHLB-D, FSLIC, and FHLBB. (These materials are cited below as "Exh. ——.") Exhibits C through J were contained in the administrative record before the Board when the Board decided to place IASA in receivership. Memorandum to Dismiss 5 n.3. Since the government's dismissal motion based on the discretionary function exception went to subject matter jurisdiction, such background materials were properly submitted to the district court. See *Land* v. *Dollar*, 330 U.S. 731, 735 n.4 (1947); 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1350, at 549 (1969) ("When the movant's purpose is to challenge the substance of the jurisdictional allegations, he may use affidavits and other matter to support his motion.").

substantial dealings.[4] During that period, IASA proposed to enter into two transactions that would greatly increase the scope of its operations: the purchase of Investex Savings Association, a troubled Texas thrift institution, and the purchase of 22 branch offices from United Savings Association, another Texas thrift. See Amended Compl. paras. 16-19; Exh. J at 60-63. Completion of these transactions required approval by federal regulators. See 12 U.S.C. 1730(q) (1988); 12 C.F.R. Pt. 574.

In part because of concerns of possible misconduct by respondent relating to the Iowa institution, federal officials had misgivings about permitting substantial expansion of IASA under respondent's control. See Exh. J at 68. Some officials also expressed concern as to whether IASA, with the greatly expanded assets and liabilities it would have following the proposed transactions, would be adequately capitalized. *Id.* at 69. In late 1984, FHLB-D and FHLBB staff recommended the institution of formal proceedings to remove respondent as an officer or director of IASA and prohibit his further involvement with its management (pursuant to 12 U.S.C. 1730(g)(2) (1988)), and the institution of a formal examination of IASA (pursuant to 12 U.S.C. 1730(m)(2) (1988)).[5] Meanwhile, federal regulators were engaged in negotiations with IASA and respondent concerning possible ways of allaying these concerns and allowing the transactions to go forward. See Exh. J at 69-74. These negotiations resulted in the execution in December 1984 of a written "neutralization agreement" between respondent and the federal regulators. See Amended Compl. paras. 12-15; Exh. J at 77-78. The agreement provided that respondent would resign from management positions

[4] See Report of Independent Counsel Aubrey B. Hardwell, Jr., to Chairman Edwin J. Gray, Federal Home Loan Bank Board, at 64-65 (Apr. 21, 1987) (Exh. J.); Amended Compl. para. 12.

[5] See Recommendation for Appointment of a Receiver for Independent American Savings Association at 27-28 (Jan. 21, 1987) (Exh. C).

at IASA and refrain from any participation in the management of the institution, and imposed limits on respondent's ability to vote or transfer his IASA stock. *Ibid.* The agreement also included a guarantee by respondent of IASA's net worth, backed by his pledge of personal assets. See Amended Compl. para. 14; Exh. J at 78.[6] Federal regulators approved the proposed acquisitions noted above, Exh. J at 78, and offered advice and assistance to IASA in carrying out these transactions. Amended Compl. para. 19.

During 1985, investigations continued, and in August 1985 the FHLBB staff recommended the institution of proceedings, pursuant to 12 U.S.C. 1730(g)(2) (1988), permanently to bar respondent from involvement with FSLIC-insured institutions. See Exh. J at 95-105; Exh. C at 31-32. Discussions continued between respondent and federal regulators in late 1985, resulting in a second agreement, set forth in a letter from respondent to the FHLBB dated December 17, 1985. Exh. D. Under the terms of that agreement, respondent agreed to remove himself permanently from IASA's management and not to serve as an officer or director of any FSLIC-insured institution without prior approval. In return, FHLBB agreed to discontinue the investigation it was conducting under 12 U.S.C. 1730(m)(2) (1988) and to forbear from the institution of removal proceedings under 12 U.S.C. 1730(g)(2) (1988).

Early in 1986, additional matters came to light that increased the federal regulators' concerns regarding IASA's soundness. In February and March 1986, IASA received reports from a management consulting firm indicating that IASA was in a precarious financial situation due to numerous possible regulatory violations, in-

[6] Although the complaint characterized the net worth guarantee as "unprecedented," the independent counsel report noted that, while such provisions had not been used frequently, they were "not totally new to the FHLBB" and that there was "mention of imposing such a requirement on new purchasers" in a congressional oversight report. Exh. J at 76.

cluding unsafe and unsound practices. See Exh. C at 39. FHLBB personnel commenced an examination of IASA on March 3, 1986, which also revealed unsafe and unsound financial practices and other regulatory violations. *Id.* at 39-41. In lieu of instituting formal proceedings against IASA, the federal regulators entered into discussions with IASA, as a result of which IASA officers and directors resigned and were replaced by individuals approved by FHLB-D personnel. See Amended Compl. paras. 20-32. FHLB-D provided indemnification of the new officers and directors in order to induce them to take on these responsibilities. *Id.* para. 32; Exh. C at 46.

According to the reports mentioned above and others prepared by accounting and consulting firms, IASA at this time faced substantial difficulties—including books that were not in condition to permit a reliable audit—and the prospect of continuing financial losses. See Exh. C at 47-48. The new IASA officers and directors took various steps aimed at dealing with this situation, such as making major adjustments to IASA's financial statements and placing an IASA subsidiary into bankruptcy. *Id.* at 48-49. During this time, federal regulators continued to forbear from taking formal regulatory actions against IASA, but consulted regularly with IASA personnel about their efforts to deal with the situation. See Amended Compl. paras. 33-37. As alleged in the Amended Complaint, FHLB-D officials frequently gave advice to IASA managers on a variety of topics. *Id.* para. 33. Specifically, the Amended Complaint charges that FHLB-D personnel "arranged for" the hiring of a particular consultant by IASA, urged IASA to convert to federally chartered status, gave advice concerning the placement of subsidiaries into bankruptcy, mediated salary disputes involving IASA officers, reviewed draft litigation papers, and "intervened" in dealings between IASA and a state regulatory body. *Id.* para. 34.

Whether in spite of or (as respondent alleges) because of these efforts, IASA's condition continued to decline. In January 1987, FHLBB began consideration of a recommendation that IASA be put into receivership. See Exh. C. In May 1987, the Texas Savings and Loan Department closed IASA, and FHLBB promptly exercised its authority, pursuant to 12 U.S.C. 1729(c)(2) (1988), to appoint FSLIC as the receiver. See *Gaubert* v. *Hendricks*, 679 F. Supp. 622, 623 (N.D. Tex. 1988).

3. *Proceedings Below*

a. Following the denial of an administrative claim made under 28 U.S.C. 2675, respondent brought this FTCA action in April 1988. The amended complaint contained allegations regarding most of the matters discussed above, including the neutralization agreement, Amended Compl. paras. 12-15 (filed Apr. 11, 1988), the actions surrounding the approval of the Investex merger, *id.* paras. 16-19, the replacement of IASA's management, *id.* paras. 20-26, the installation of a new board of directors, *id.* paras. 27-32, and the subsequent involvement of federal regulators in NASA's "day-to-day operations," *id.* paras. 33-37. The complaint further alleged that federal officials acted negligently in carrying out these activities, *id.* paras. 44-58, and that IASA's insolvency and other problems were caused by such negligence, *id.* paras. 38-39, 49, 59.

The United States moved to dismiss on the ground that the challenged actions were immune from suit under the discretionary function exception to the FTCA, 28 U.S.C. 2680(a). The district court granted the motion, holding that all of respondent's claims were barred by that exception. App., *infra*, 21a-26a. The court recognized that the amended complaint focused on actions suggested to IASA by federal regulators, in which IASA was induced to acquiesce by the threat of receivership or other formal regulatory action. *Id.* at 23a-24a. Concluding that a decision to seek receivership would unquestionably fall within the discretionary function exception, the court determined that a decision to exert informal

suasion in lieu of such formal enforcement is likewise discretionary in nature and therefore also within the exception. *Id.* at 24a-25a. Accordingly, the court concluded that the present action fell outside the FTCA's limited waiver of sovereign immunity. *Id.* at 25a-26a.

b. The court of appeals reversed in part, holding that as a matter of law certain actions taken by the federal regulators were not subject to the discretionary function exception. App., *infra*, 1a-20a.

The court began its analysis of the discretionary function exception with a discussion of this Court's ruling in *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955). App., *infra*, 6a-7a. While acknowledging that the government had not invoked the discretionary function exception in that case, the court of appeals referred to the case as having established a "principled distinction between policy decisions and operational actions" that "still retains its force today and is dispositive of this case." *Id.* at 7a. The court of appeals then discussed this Court's recent discretionary function cases, *United States* v. *Varig Airlines*, 467 U.S. 797 (1984), and *Berkovitz* v. *United States*, 486 U.S. 531 (1988). App., *infra*, 7a-11a. With respect to *Varig*, the court noted this Court's central holding that the discretionary function exception is aimed at "prevent[ing] judicial 'second guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *Id.* at 9a (quoting *Varig*, 467 U.S. at 814). And in *Berkovitz*, the court of appeals observed, the discretionary function exemption had been ruled unavailable where government officials violate express statutory or regulatory requirements. App., *infra*, 10a. The court then stated that the holding in *Berkovitz* was "[u]nfortunately" not dispositive of this case, since FHLBB and FHLB-D officials did not violate any express statutory or regulatory provisions. *Id.* at 11a. The court found guidance, however, in a footnote in *Berkovitz*, which cited *Indian Towing* as an example of a case not involving the sort of policy discretion covered by the discretionary function exception. *Ibid.* (quoting *Berkovitz*, 486 U.S. at 538 n.3). In the court of appeals' view, "[a]ny doubts about the sustained viability of th[e] ["discretionary function/operational activity"] distinction were put to rest" by that footnote. *Ibid.* Thus, the court concluded, any activity that is "operational in nature" necessarily falls outside the scope of the exception. *Id.* at 12a. As the court summarized, "the FHLBB and FHLB-Dallas officials were only protected by the discretionary function exception until their actions became operational in nature and thus crossed the line established in *Indian Towing*." App., *infra*, 12a-13a.

Applying what it called "the *Indian Towing* test," App., *infra*, 13a, to the activities at issue in this case, the court of appeals agreed with the district court about the initial actions taken by the federal regulators. "Clearly, the decision to merge IASA with Investex and seek a neutralization agreement from [respondent] was a policy oriented decision protected by § 2680(a)." App., *infra*, 13a-14a. "Similarly," the court went on, "the decision to replace the IASA Board of Directors with FHLBB approved persons, and the actions taken to effectuate that decision, are protected under the discretionary function exception." *Id.* at 14a. The court held, however, that the federal regulators ceased to perform "discretionary functions"

> when they began to advise IASA management and participate in management decisions, including hiring a consultant, directing that IASA convert to a federally-chartered entity, supervising the filing of litigation on behalf of IASA, and other allegations contained in ¶¶ 33-43 of [respondent's] Amended Complaint.

Ibid. On the basis of this holding, the court remanded the case to the district court for further proceedings. *Id.* at 19a-20a.[7]

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[7] Because the court of appeals reversed a portion of the district court's judgment on the discretionary function exception, it ad-

REASONS FOR GRANTING THE PETITION

The court of appeals' ruling reflects a serious misreading of the discretionary function exception—an exception that has long been a pivotal limitation on governmental liability under the FTCA. By setting up what it saw as a bright-line distinction based on the "operational" nature of certain activities, the court ignored the fact that many actions that can fairly be characterized as "operational" are nevertheless highly discretionary in nature and are "grounded in social, economic, and political policy." *Varig*, 467 U.S. at 814. Other courts of appeals have recognized that a distinction based on the "operational" nature of government actions is inconsistent with this Court's holding in *Varig*. But the Fifth Circuit's ruling in the present case, which revives this spurious distinction, reflects continuing confusion and division in the circuits. Thus, we believe the time is ripe for the Court to address this recurring issue and make clear that the application of the exception turns on the nature of the discretion exercised, not on such artificial distinctions as that between "planning" or "policy" and "operational" activities.

1. a. As this Court explained in *Varig*, the discretionary function exception is a particularly important limitation on FTCA liability, and was designed principally "to preclude application of the act to a claim based upon an alleged abuse of discretionary authority by a regulatory or licensing agency." 467 U.S. at 809 (quoting *Hearings on H.R. 5373 and H.R. 6463 Before the House*

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dressed certain issues pretermitted by the district court. App., *infra*, 14a-20a. The court held that, under Texas law regarding injuries suffered by corporations, respondent could not sue for the alleged diminution of the value of his IASA stock. *Id.* at 19a. But with respect to the personal property respondent posted as a guarantee as part of the neutralization agreement—alleged to be worth $25 million—the court ruled that respondent might be able to maintain a cause of action. *Ibid.* The court remanded the case to the district court for resolution of that issue. *Id.* at 19a-20a.

Committee on the Judiciary, 77th Cong., 2d Sess. 28 (1942) (statement of Assistant Attorney General Francis M. Shea)). The exception has its roots in the constitutional doctrine of separation of powers, since without it the courts would repeatedly be called upon to second-guess political and economic judgments properly entrusted to the Executive Branch. See, *e.g.*, *Laird* v. *Nelms*, 406 U.S. 797, 811-812 n.11 (1972) (Stewart, J., dissenting); *In re Joint Eastern & Southern Districts Asbestos Litigation*, 891 F.2d 31, 35 (2d Cir. 1989); *Kennewick Irrigation District* v. *United States*, 880 F.2d 1018, 1021-1022 (9th Cir. 1989).

The decisions of this Court applying the discretionary function exception have consistently stressed that it is the nature of the discretion exercised, not the level at which action is taken, that defines "discretionary functions" under the exception. Thus, in the seminal case of *Dalehite* v. *United States*, 346 U.S. 15 (1953), involving an explosion on a ship containing fertilizer for a federal export program, the complaint alleged negligence at several levels, from broad policy decisions to the alleged failure "to police the shipboard loading" of the fertilizer. *Id.* at 23-24. In holding that all of these activities fell within the discretionary function exception, the Court stated that the exception

> includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable.

Id. at 35-36 (footnote omitted).

In *Varig*, the Court reiterated that principle, 467 U.S. at 811, and applied it to another multi-level complaint, this time involving the conduct of airplane safety inspec-

tions. The Court first upheld the overall decision of the Federal Aviation Administration (FAA) to employ a "spot-check" system to review aircraft designs by manufacturers. *Id.* at 816-820. The Court next recognized that "the acts of FAA employees in executing the 'spot-check' program" were also discretionary in nature because they necessarily involved policy judgments regarding the degree of inspection in particular instances and the taking of "calculated risks" in furtherance of FAA's overall regulatory policies. *Id.* at 820.

The Court's most recent discretionary function decision, *Berkovitz* v. *United States*, *supra*, reaffirms those principles. As the court below recognized, *Berkovitz* dealt principally with a particular problem that is *not* presented here—*i.e.*, governmental activities subject to a "specifically prescribe[d] course of action" set forth in a statute or regulation. 486 U.S. at 536. Where such a prescribed course exists, a federal official must follow it and does not have any "discretion" of the sort that the discretionary function exception was designed to protect. *Ibid.* At the same time, *Berkovitz* reiterated the essential teaching of *Varig*—that the exception applies to all "legislative and administrative decisions grounded in social, economic, and political policy." *Id.* at 537 (quoting *Varig*, 467 U.S. at 814).

b. The analysis of the court of appeals is flatly inconsistent with *Dalehite* and *Varig*. The clear lesson of those cases is that the level at which an action is taken —whether characterized as planning, policy, or operational—is unimportant; what matters is whether a particular decision is "grounded in social, economic, [or] political policy." *Varig*, 467 U.S. at 814. If a particular action meets this test, it is subject to the discretionary function exception, even if it implements some higher-level decision and thus could be characterized as "operational" in nature. This is especially clear from the Court's treatment of allegations regarding the actions of federal employees in policing the loading of ships in *Dalehite* and in inspecting airplanes in *Varig*.

The court of appeals made no effort to compare the "operational" activities in the present case with the implementing activities at issue in *Dalehite* or *Varig*. Nor did it pause to consider whether the actions in question involved discretionary judgments grounded in economic regulatory policy. Had it done so—instead of relying on a talismanic distinction between "operational" and other activities—the court would have been confronted with the discretionary nature of these activities.

In the statutory and regulatory context of the present case, the supervisory actions taken by federal officers and employees were part and parcel of the regulatory process, and were designed to serve the same policies as more formal measures such as cease-and-desist orders, removal of bank officers, and receivership. In either case, the federal regulators act to protect the interest of the public at large in preserving depositor confidence in savings institutions and in safeguarding the fiscal integrity of the federal deposit insurance fund. See generally *Woods* v. *Federal Home Loan Bank Bd.*, 826 F.2d 1400, 1411 (5th Cir. 1987), cert. denied, 485 U.S. 959 (1988).

As the court of appeals expressly recognized in this case, the authority of federal regulators to pursue these goals by seeking informal cooperation by private institutions—instead of taking more drastic, formal regulatory actions—is "unchallenged." App., *infra*, 12a; see also *Miami Beach Federal Savings & Loan Ass'n* v. *Callander*, 256 F.2d 410, 414-415 (5th Cir. 1958) ("When a governmental agency holds such great powers over its offspring, even to the point of appointing a conservator or receiver to replace management, * * * it is difficult to hold that an informal request, even demand, to clean house would amount to an abuse of the statutory powers and discretion of the agency."). The court of appeals also recognized that the federal regulators "did not have regulations telling them, at every turn, how to accomplish their goals for IASA." App., *infra*, 12a. The court failed, however, to draw the logical conclusion that, in advising IASA and recommending courses of action to it,

federal regulators were engaged in the same kinds of discretionary judgments that they engage in when deciding whether and at what point to take more formal actions against an institution.

For example, in advising IASA managers to engage a consultant, close a particular subsidiary, or even file a lawsuit, the federal regulators were making judgments concerning the best way to further the regulatory goals of preserving the institution's soundness in order to safeguard federal deposit insurance funds. Such decisions are unquestionably "grounded in * * * economic * * * policy," *Varig*, 467 U.S. at 814, and should not be subject to judicial second-guessing under the FTCA. Nor can it be doubted that a federal regulator's advice to an institution to convert to federally chartered status is a judgment grounded in regulatory policy. Furthermore, because all of these actions were expressly taken in lieu of more formal regulatory actions, including receivership, federal regulators also had to consider at every juncture whether the particular actions they were advising were likely to produce beneficial results that would justify the agency's continued forbearance from formal proceedings. Whether the particular actions taken turn out to be beneficial or harmful, they constitute precisely the sort of regulatory choices that lie at the heart of the discretionary function exception. See *Varig*, 467 U.S. at 813-814.

c. Neither this Court's decision in *Indian Towing*, *supra*, nor the footnote reference to *Indian Towing* in the *Berkovitz* opinion, provides any justification for the court of appeals' departure from the principles established in *Dalehite* and *Varig*. *Indian Towing* did not even address the discretionary function exception, the inapplicability of which had been conceded by the government. See *Varig*, 467 U.S. at 812 (noting the significance of this fact). Moreover, the court of appeals misread the footnote in the *Berkovitz* opinion discussing *Indian Towing*. 486 U.S. at 538 n.3. As the Court there noted, *Indian Towing* "illuminates" the scope of the discretionary function exception by providing examples of both discretionary and non-discretionary government activity—*i.e.*, the unquestionably discretionary decision to construct and maintain a lighthouse in a particular location, and the non-discretionary activity of keeping the lighthouse in working order. This useful illustration does not purport to provide a comprehensive definition of activities that fall within the discretionary function exception. Still less does it purport to establish a rule that any activity that may be classified as "operational" is, by that fact alone, outside the scope of the exception.

The present case involves a situation that was simply not addressed in either *Indian Towing* or *Berkovitz*—that of governmental activity that is "operational" in the sense that it implements a higher-level regulatory decision, but that nevertheless calls for the exercise of policy discretion. This Court has dealt with such situations, however, in *Dalehite* and *Varig*, and the court of appeals erred in failing to follow the guidance of those cases.

2. The court of appeals' simplistic reliance on the "operational" nature of the actions at issue here was not merely an aberrational ruling. On the contrary, the notion that the discretionary function exception is inapplicable to "operational" activities is a misconception that has cropped up in decisions of the courts of appeals for many years. See, *e.g.*, *United States* v. *Hunsucker*, 314 F.2d 98, 103-104 (9th Cir. 1962) (using distinction between "planning" and "operational" activities); *Fleishour* v. *United States*, 365 F.2d 126, 128 (7th Cir.) (same), cert. denied, 385 U.S. 987 (1966).[8] But see

[8] In drawing this distinction, some cases have relied on this Court's reference to "operational" matters in *Dalehite*, 346 U.S. at 42. See, *e.g.*, *Hunsucker*, 314 F.2d at 103-104; *Emch* v. *United States*, 630 F.2d 523, 527 (7th Cir. 1980), cert. denied, 450 U.S. 966 (1981). As the discussion above shows, however, the *Dalehite* Court did not intend by that term to exclude from the scope of the exception—as the court of appeals did in the present case—actions that implement policy made at a higher level but which themselves in-

Smith v. *United States*, 375 F.2d 243, 246 (5th Cir.) (recognizing that not all "operational" activities fall outside the scope of the exception), cert. denied, 389 U.S. 841 (1967). In our view, this Court's decision in *Varig* squarely rejected that limitation by applying the exception to activities that were operational but that nevertheless entailed significant policy discretion. At least one court of appeals so read the *Varig* opinion, expressly overruling its prior use of the planning/operational distinction as inconsistent with the teachings of *Varig*. See *Begay* v. *United States*, 768 F.2d 1059, 1062-1063 n.2 (9th Cir. 1985).

A review of cases decided since *Varig* (including some decided after *Berkovitz*), however, shows a continuing split of circuit authority on this issue. On the one hand, the Ninth Circuit expressly considered and rejected the notion—crucial to the analysis of the court below in this case—that *Berkovitz* somehow revived the "operational" rule:

> The *Berkovitz* reference to *Indian Towing* must be read in the context of *Dalehite* and *Varig*. A matter does not fall outside the discretionary function exception merely because the decision to embark on an activity has already been made. Were that the case, *Dalehite* and *Varig* would be eviscerated.

Kennewick Irrigation District v. *United States*, 880 F.2d at 1024-1025. The Third, Fourth, Tenth, and District of Columbia Circuits also appear to reject the operational limitation.[9] On the other hand, the Eighth and Eleventh

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volve the exercise of policy discretion. Indeed, the evident ambiguity of the term "operational" provides all the more reason to reject it as a dispositive test.

[9] *U.S. Fidelity & Guaranty Co.* v. *United States*, 837 F.2d 116, 121 (3d Cir.), cert. denied, 487 U.S. 1235 (1988); *Patterson* v. *United States*, 856 F.2d 670, 673-674 (1988), modified, 881 F.2d 127 (4th Cir. 1989) (en banc); *Allen* v. *United States*, 816 F.2d 1417, 1420-1421 (10th Cir. 1987), cert. denied, 484 U.S. 1004 (1988); *Red Lake Band of Chippewa Indians* v. *United States*, 800 F.2d 1187, 1195-1196 (D.C. Cir. 1986). See *MacArthur Area Citizens Ass'n* v. *Republic of Peru*, 809 F.2d 918, 923 (D.C. Cir. 1987) (applying analogous provision of Foreign Sovereign Immunities Act).

Circuits, in addition to the court below, appear to continue to embrace it.[10]

This division is not merely a matter of semantics; it reflects a substantial inconsistency in the application of the FTCA. For example, in *U.S. Fidelity & Guaranty Co.* v. *United States*, 837 F.2d 116, 121 (3d Cir.), cert. denied, 487 U.S. 1235 (1988), an insurer based an FTCA claim on the alleged negligence of an EPA official in directing a toxic waste cleanup. The decisions at issue, such as the timing of operations in light of weather conditions and other considerations, could readily be characterized as "operational" under the test used in the present case, yet the Third Circuit recognized the discretionary nature of such actions. See 837 F.2d at 121-122. Similarly, in *Kennewick Irrigation District*, *supra*, which involved claims of negligence in the Bureau of Reclamation's design and choice of materials following its initial decision to build a canal, the Ninth Circuit recognized a broad range of design decisions (those involving significant "economic" judgments) as being discretionary. See 880 F.2d at 1028-1030. These rulings, in sharp contrast to the decision below, are altogether consistent with the teachings of this Court in *Dalehite* and *Varig*.

3. While this important split in circuit authority would itself be reason enough to warrant this Court's attention, the need for review is underscored by the practical ramifications of the decision below. That decision came at a critical juncture for federal efforts to

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[10] *E. Ritter & Co.* v. *United States*, 874 F.2d 1236, 1241 (8th Cir. 1989); *United States Fire Insurance Co.* v. *United States*, 806 F.2d 1529, 1535-1536 (11th Cir. 1986) (applying discretionary function exception under Public Vessels Act, but relying on FTCA case law). See also *Caplan* v. *United States*, 877 F.2d 1314, 1319 (6th Cir. 1989) (Martin, J., concurring).

regulate financial institutions, particularly thrift institutions. Only a year ago, Congress, responding to what it termed a "crisis" in the thrift industry, enacted major changes in the statutory scheme of thrift regulation. H.R. Rep. No. 54, 101st Cong., 1st Sess., Pt. 1, at 294, 302-305 (1989). This crisis, in Congress's view, was brought about by a combination of factors including precipitous growth by many thrift institutions—often accompanied by poor management and fraudulent practices—and the lack of resources for sufficiently vigorous enforcement efforts. *Id.* at 298-301. Congress sought to address these problems by seeking to foster "stronger supervisory oversight." *Id.* at 307-308.

The legislation enacted to address this crisis—the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (FIRREA)—made major changes in the federal regulatory structure and created new federal agencies to deal with the affairs of failed thrift institutions. At the same time, that law has not altered the basic regulatory tools available to deal with the problems of troubled institutions. For example, while the Act abolished FHLBB and FSLIC and repealed the specific statutory enforcement provisions invoked in this case, see FIRREA §§ 401, 407, 103 Stat. 354-357, 363, that law assigned substantially similar authority for examinations, cease-and-desist orders, and the imposition of receiverships to the Federal Deposit Insurance Corporation (FDIC) and to the newly-created Office of Thrift Supervision (OTS). *Id.* §§ 201, 301, 103 Stat. 187-188, 277-343. Despite other provisions of the Act that enhance enforcement authority in various ways, see *id.* §§ 901-968, 103 Stat. 446-506, these agencies will continue to use the sort of informal, supervisory techniques used in the present case, in an effort to assist regulated institutions without invoking formal regulatory procedures. Indeed, the regulatory workload engendered by the large number of troubled thrift institutions across the Nation will undoubtedly require federal

regulators to employ such techniques in order to provide the "vigilant and responsive" regulatory action mandated by Congress. H.R. Rep. No. 54, *supra*, at 291.

While Congress has recognized a heightened need for decisive and flexible regulatory efforts in this area, the decision below can only hobble and confine such efforts. By exposing the federal fisc to potentially massive liability whenever federal thrift regulators cross an ill-defined line into the "operational" sphere, the court of appeals' ruling will promote frequent judicial second-guessing of regulators' efforts to deal with troubled institutions. Perhaps even more significantly, the spectre of such liability will necessarily discourage regulatory vigor.[11]

Moreover, although the court of appeals purported to acknowledge the propriety of using informal supervision and advice in lieu of formal regulatory action, App., *infra*, 12a, the rule it announced will inevitably skew regulatory intervention toward more formal—and more intrusive—actions. As the courts have repeatedly recognized, decisions to invoke formal regulatory powers, such as declaring a financial institution insolvent and appointing a receiver, are clearly within the scope of the discretionary function exception. See *Golden Pacific Bancorp.* v. *Clarke*, 837 F.2d 509, 512 (D.C. Cir.), cert. denied, 488 U.S. 890 (1988);[12] *Huntington Towers, Ltd.*

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[11] Although respondent has alleged (inaccurately, in our view) that some of the specific actions taken in this case were "unprecedented" (Amended Compl. paras. 13, 14), the court of appeals' reasoning was not tied to any extraordinary feature of this case, but instead was based simply on the "operational" nature of certain activities. It thus states a sweeping rule that will seemingly subject thrift regulators to second-guessing any time they give practical advice to an institution's management in an effort to assist the institution in improving its circumstances in order to obviate more formal regulatory measures.

[12] "The Comptroller, incident to his responsibilities, must make innumerable subtle judgments in describing the content of safe and sound bank practices—judgments that draw upon a mix of law, ac-

v. *Franklin National Bank*, 559 F.2d 863, 869-870 (2d Cir. 1977), cert. denied, 434 U.S. 1012 (1978); see also *Emch* v. *United States*, *supra* (failure to take regulatory action is a decision within discretionary function exception). Indeed, the court of appeals in the present case appears to recognize this principle by holding that several of the regulators' actions fall within the exception. App., *infra*, 13a-14a. By labeling as "operational" the actions of regulators in advising IASA management of ways to avoid the need for such formal intervention, the court of appeals has created a strong incentive to bypass such advice and instead proceed directly to formal steps. The ruling below thus has the effect of restricting regulatory options at a time of urgent need for swift and flexible intervention.[13] That is precisely the result Congress sought to avoid by enacting the discretionary function exception: The decision below permits the courts, at the behest of private parties, to dictate "policy through the medium of an action in tort." *Varig*, 467 U.S. at 814.

Moreover, the problems created by the court of appeals' ruling will not be limited to federal efforts to deal with the crisis in the thrift industry. As the cases cited above reflect, the discretionary function exception arises in cases involving a wide variety of regulatory and other governmental conduct. Because the court of appeals' ruling purports to rest on a bright-line test of the "operational" nature of governmental conduct, it

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counting, bank custom, and policy. Sometimes, as here, those determinations must be made under grave pressure and expeditiously. The government is not liable in damages merely because in a particular case the Comptroller's conclusion or some aspect of it turns out to be legally vulnerable." *Golden Pacific Bancorp.*, 837 F.2d at 512.

[13] While the decision below will have its most direct impact within the Fifth Circuit—an area of the Nation that has experienced a disproportionate number of thrift failures in recent years—it will also cloud the proper application of the discretionary function exception in those other circuits that have not expressly rejected the Fifth Circuit's "operational" limitation on the scope of the exception.

will promote incorrect analysis, and incorrect results, in a broad range of FTCA cases. Only plenary review by this Court can correct this error and secure the consistent application of the FTCA among the circuits.[14]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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[14] While the court of appeals' decision is interlocutory in that it remands to the district court for further proceedings, that decision conclusively resolves the critical issue of the application of the discretionary function exception in this case, by holding that the government's actions do not fit within that exception as a matter of law. This Court has frequently granted certiorari in cases in this posture—involving a court of appeals' ruling reversing an order of dismissal—where an important issue of law has been presented. See *Land* v. *Dollar*, 330 U.S. at 734 n.2; *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 727 (1975). Indeed, in at least one such case the questions involved FTCA exceptions. See *United States* v. *Shearer*, 473 U.S. 52, 54 (1985).

* The Solicitor General is disqualified in this case.

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 88-1923

THOMAS M. GAUBERT, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

Appeal from the United States District Court
for the Northern District of Texas

Oct. 17, 1989

Before GEE, GARZA, and JONES, Circuit Judges

GARZA, Circuit Judge:

This case requires us to further define the scope of the discretionary function exception to the Federal Tort Claims Act. Appellant's case below was dismissed for lack of subject matter jurisdiction. We find the discretionary function exception to the Torts Claims Act inapplicable to certain of the alleged actions taken in this case. However, we find that Gaubert does not have standing to sue for the lost value

of his shares, and we must dismiss that part of his suit.

Background

When deciding a motion to dismiss for lack of subject matter jurisdiction under Fed.Rule Civ.Proc. 12(b)(1), we construe the complaint broadly and liberally, although argumentative inferences favorable to the pleader will not be drawn. *Norton v. Larney*, 266 U.S. 511, 45 S.Ct. 145, 69 L.Ed. 413 (1925); *see also* Fed.Rule Civ.Proc. 8(f). We will also accept as true all uncontroverted factual allegations of the pleadings. *Gibbs v. Buck*, 307 U.S. 66, 59 S.Ct. 725, 83 L.Ed. 1111 (1939). We therefore present the facts of this case, which are alleged in Gaubert's complaint, in light of the above standards.

Appellant Thomas M. Gaubert was, at all times relevant to this case, the largest shareholder and chairman of the board of Independent American Savings Association ("IASA"), a Texas state-chartered and federally-insured savings and loan. From January 1983 through March 1986, IASA grew and its financial health remained good.

In the Fall of 1984, officials at the Federal Home Loan Bank Board ("FHLBB") wanted IASA to merge with a failing Texas thrift, Investex Savings. The closing of this transaction was delayed, however, by an investigation of another S & L in which Gaubert had been involved. In order to resolve this impasse, the FHLBB and Federal Home Loan Bank-Dallas ("FHLB-Dallas") requested that Gaubert sign a neutralization agreement in order to secure Gaubert's effective removal from the affairs of IASA. Gaubert agreed to this proposal. Gaubert was also required, as part of the merger transaction, to per-

sonally guarantee that the net worth of IASA would not fall below regulatory minimums. To accomplish this, Gaubert was asked to contribute a personal interest in real estate valued at more than $25 million; Gaubert ultimately lost this property when IASA became insolvent. No other shareholder or director of IASA was required to sign a neutralization agreement, give a personal guarantee, or asked to contribute property.

Officials at the federal agencies then assisted IASA in its merger with Investex by providing regulatory and financial advice. They advised IASA on how it should present the transactions to its shareholders for approval and helped draft proxy statements disclosing Gaubert's neutralization agreement. During this period, IASA was not under a supervisory agreement, receivership, conservatorship, or cease-and-desist order. Rather, the federal involvement came as a result of the inherent persuasive power of the FHLBB, which no doubt arises from the position of authority it occupies; the government euphemistically refers to this ability to pressure S & Ls as "jawboning."

Officials at FHLB-Dallas next sought the replacement of IASA's management and Board of Directors. In February or March of 1986, the Board was told that FHLB-Dallas would close IASA if it did not actively cooperate with this plan. FHLB-Dallas then searched for and selected the new Board of Directors and officers of IASA. In order to persuade the existing directors and officers to resign, Gaubert was freed from his neutralization agreement in return for his efforts to encourage the IASA Board of Directors to resign and allow FHLB-Dallas to pick the new directors and manage IASA.

All IASA directors tendered their undated resignations, even though no proceedings aimed at obtaining

a supervisory agreement had even been initiated for IASA. In April 1986, the directors were replaced, and a former FHLB-Dallas employee was installed as CEO. The other directors and officers, all selected by FHLB-Dallas, were ultimately elected.

After engineering the resignation and replacement of IASA management, officials at FHLB-Dallas actively involved themselves in IASA's affairs and played an increasingly larger role in the day-to-day operations. FHLB-Dallas officials arranged for the hiring of a consulting company on operational and financial matters and asset management. Advice and recommendations concerning whether, when, and how to place IASA subsidiaries into bankruptcy were given by FHLB-Dallas officials to the IASA Board. Salary disputes between IASA and its senior officers were mediated by FHLB-Dallas, which also reviewed a draft of a complaint in litigation that the Board of Directors contemplated filing. FHLB-Dallas urged that IASA convert from a state-chartered S & L to a federally chartered S & L so that it could become the exclusive government entity with power to control IASA. FHLB-Dallas employees actively intervened with the Texas Savings and Loan Department when the state attempted to install a supervisory agent at IASA.

Shortly after the IASA Board of Directors was replaced, the new directors announced that IASA had over a $400 million negative net worth; this was a surprising development in light of the fact that IASA believed its net worth to be about $74 million positive at the end of 1985. On May 20, 1987, Gaubert filed an administrative tort claim with the FHLBB, FHLB-Dallas, and FSLIC seeking damages in the amount of $75 million for the lost value of his shares, and $25 million for the property he forfeited under

the guarantee agreement; that claim was denied by letter dated November 20, 1987. On May 20, 1987, the IASA was placed into the receivership of FSLIC.

Gaubert filed suit individually in United States District Court for the Northern District of Texas under the Federal Tort Claims Act, 28 U.S.C. § 1346, alleging the negligent selection of directors and officers (Count I) and the negligent involvement in day to day operations (Count II) by federal officials. The government moved for dismissal, citing (1) Gaubert's lack of individual standing as a shareholder of IASA, and (2) lack of subject matter jurisdiction as grounds. The district court granted the motion to dismiss for lack of subject matter jurisdiction on September 28, 1988, and did not reach the issue of standing. Gaubert appeals that dismissal here.

Subject Matter Jurisdiction Under the FTCA

When suing the federal government, a plaintiff must first overcome the bar of sovereign immunity, which establishes that the federal government is not liable for damages resulting from sovereign acts performed by it in its sovereign capacity. *Horowitz v. United States*, 267 U.S. 458, 461, 45 S.Ct. 344, 344, 69 L.Ed. 736 (1925). The Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346(b), is a limited statutory waiver of the federal government's sovereign immunity. The FTCA authorizes suits against the United States for

> injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee or the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be li-

> able to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b).

The act, however, contains certain exceptions to the federal government's waiver of immunity. One of these exceptions is known as the Discretionary Function Exception, which reads in pertinent part as follows:

> The provisions of [The FTCA] shall not apply to—
>
> > (a) Any claim based upon an act or omission of an employee of the government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. § 2680(a). The district court concluded that this exception to the FTCA was applicable to this case, and therefore dismissed the suit for lack of subject matter jurisdiction. Gaubert contends that the district court's conclusion was in error, since the actions of the FHLBB and FHLB-Dallas lost the protection of the discretionary function exception when they began to assume operational, day-to-day control over IASA. Analysis of this well-taken point requires us to plumb the depths of Supreme Court decisions in this area; it is to this task which we now turn.

An early case in the Supreme Court applying the FTCA to negligence which can be characterized as

being at the "operational level" of governmental activity is *Indian Towing Co. v. United States*, 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955). That case involved the negligent operation by the Coast Guard of a lighthouse light, resulting in the running aground of a barge. The Coast Guard argued that the FTCA, by its terms, excluded liability in the performance of activities which private persons do not perform. Thus, there would be no liability for negligent performance of uniquely governmental functions. The Court rejected this argument, noting that the Coast Guard did not have a duty to undertake the lighthouse service, but that "once it exercised its discretion to operate a light . . . and engendered reliance on the guidance afforded by the light, it was obligated to use due care to make certain that the light was kept in good working order. . . . If the Coast Guard failed in its duty and damage was thereby caused to petitioners, the United States is liable under the Federal Torts Claims Act." *Id.* at 69, 76 S.Ct. at 126-27.

Although *Indian Towing* established the applicability of the FTCA to unique and operational activities of government, it is not, contrary to Gaubert's assertions, dispositive of the case at bar. The Coast Guard, in *Indian Towing*, expressly conceded that the discretionary function exception of § 2680(a) was inapplicable. The case did, however, establish the principled distinction between policy decisions and operational actions; this distinction still retains its force today and is dispositive of this case. We next turn to more recent Supreme Court precedent for further analysis of the scope of the discretionary function exception to the FTCA.

An oft-cited Supreme Court decision on the scope of the discretionary function exception was *United*

States v. Varig Airlines, 467 U.S. 797, 104 S.Ct. 2755, 81 L.Ed.2d 660 (1984); the government primarily relies on this case to support its argument that the discretionary function exception applies here. In *Varig*, families and representatives of passengers who died in a fire aboard a Boeing 707 aircraft sued the Federal Aviation Administration ("FAA") under the FTCA. The suit alleged negligence of the FAA in certifying that aircraft for use in commercial aviation.[1]

The Supreme Court held that the actions of the FAA fell within the § 2680(a) discretionary function exception. Central to the court's holding was its interpretation of the policy behind the exception, which the court expressed as follows: "It is neither desirable or intended that the constitutionality of legislation, the legality of regulations, or the propriety of a discretionary administrative act be tested through the medium of a damage suit for tort." *Varig*, 467 U.S. at 809-10, 104 S.Ct. at 2762. The Court went

[1] The first stage of FAA certification is type certification, in which the FAA approves the basic design of the aircraft which a manufacturer wishes to produce. 49 U.S.C. § 1423(a)(2); 14 C.F.R. § 21.21(a)(1). The next step is the issuance of a production certificate, which requires the manufacturer to prove that it has established and can maintain a quality control system to assure each plane produced will meet the design parameters of the type certificate. 14 C.F.R. §§ 21.139, 21.143. After issuance of a production certificate, production of aircraft may begin, but before they are placed into service, an airworthiness certificate must be obtained for each individual aircraft. The airworthiness certificate denotes that the particular aircraft conforms to the specifications of the type certificate, and is in condition for safe operation. 49 U.S.C. § 1423(c). All evaluation of application for certificates is performed by FAA representatives or by properly qualified and appointed private persons. 14 C.F.R. § 183.29.

on to note that "Congress wished to prevent judicial 'second guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *Id.* at 814, 104 S.Ct. at 2765.[2] Holding that the decisions made by the FAA regarding proper certification procedure were discretionary, the Supreme Court dismissed plaintiff's suit.

The Supreme Court recently revisited the discretionary function exception in *Berkovitz v. United States*, 486 U.S. 531, 108 S.Ct. 1954, 100 L.Ed.2d 531 (1988). That case involved a suit by an infant against the United States under the FTCA for damages resulting from the infant's contracting polio, allegedly as a result of ingesting a polio vaccine. The complaint specifically alleged that the Division of Biologic Standards ("DBS"), then a part of the National Institute of Health, had acted wrongfully in licensing the production of the vaccine. It also alleged that the Bureau of Biologics of the Food and Drug Administration had wrongfully approved release to the public of the particular lot of vaccine in question.

[2] The *Varig* Court also sought to breathe new life into the previous case of *Dalehite v. United States*, 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1427 (1953) (holding the discretionary function exception applied to a fertilizer explosion which had been produced and distributed under the direction of the United States). The viability of *Dalehite* had been questioned following the Supreme Court's decision in *Indian Towing*, as well as in *Union Trust Co. v. Eastern Air Lines Inc.*, 350 U.S. 907, 76 S.Ct. 192, 100 L.Ed. 796 (1955) (summary affirmation permitting suit under FTCA which alleged negligence of air traffic controllers which caused a midair collision between two aircraft trying to land at Washington National Airport).

The Supreme Court held that neither of plaintiff's two allegations were barred by the discretionary function exception. With regard to the first allegation—that the DBS had wrongfully issued a license—the Court held that it was not barred because the DBS had issued a license without first receiving the stat utorily required data showing how the product, at various stages of the manufacturing process, matched up against regulatory safety standards. Since the DBS did not have statutory discretion to issue a license without receiving the required test data, the discretionary function exception could not bar a suit alleging this failure. *Id.* at ——, 108 S.Ct. at 1961-62, 100 L.Ed.2d at 544-45.[3] With regard to the second allegation of negligence—approving the specific lot for release to the public—the Court likewise held that the discretionary function exception was not a bar. Central to the Court's reasoning was that the Bureau's inspection policy did not leave room for an official to exercise policy judgment in performing a given act. Since there was no room for policy judgment, the discretionary function exception did not apply. *Id.* at ——, 108 S.Ct. at 1964-65, 100 L.Ed. 2d at 547-48.

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[3] The court noted that, had plaintiffs claimed that the DBS made a determination that the vaccine complied with regulatory standards, but that the determination was incorrect, the analysis of the applicability of the discretionary function exception would be somewhat different. In that event, the question would be whether the manner and method of determining compliance involved agency judgment of the kind protected by the discretionary function exception, which was the issue presented in *Varig*. The Court did not reach this question, however, due to the fact that the actual licensing decision was carried out in violation of statutory directives.

Unfortunately, the holding in *Berkovitz* is not dispositive of this case. Both allegations of negligent licensing and negligent approval were held to be nondiscretionary because of the existence of statutes in both cases which afforded no room for policy judgment. In the case before us, the actions of the FHLBB and FHLB-Dallas were not as closely guided by statute. The real guidance that we obtain from *Berkovitz* is in its discussion of the discretionary function/operational activity dichotomy which was first established in *Indian Towing*. Any doubts about the sustained viability of that distinction were put to rest by the Court in *Berkovitz*, which noted that

> [t]he decision in *Indian Towing* also illuminates the appropriate scope of the discretionary function exception. . . . The Court stated that the initial decision to undertake and maintain lighthouse service was a discretionary judgment. The Court held, however, that the failure to maintain the lighthouse in good condition subjected the Government to suit under the FTCA. The latter course of conduct did not involve any permissible exercise of policy judgment.

Id. at ——, 108 S.Ct. at 1959, n. 3, 100 L.Ed.2d at 542, n. 3.

In this case, FHLBB and FHLB-Dallas officials were not acting pursuant to statute when they acted to assume operational control of IASA through their considerable "powers of persuasion." This fact alone, however, does not insulate them from liability. As should now be clear from our above discussion of Supreme Court precedent, there are two distinct strands of conduct to which the discretionary function exception does not apply. The first are cases where the official is acting pursuant to statute, and therefore

has no real discretion, as her actions are pre-ordained by Congress. *See Berkovitz*, 486 U.S. 531, 108 S.Ct. 1954, 100 L.Ed.2d 531; *Collins v. United States*, 783 F.2d 1225 (5th Cir. 1986) (failure to reclassify a mine as gassy not protected by § 2680 because regulations mandated reclassification, thus leaving no room for policy judgment).

The second type of conduct not encompassed by the discretionary function exception are those actions which are undertaken outside of the strictures of statutory or regulatory mandates, but which are nonetheless operational in nature. That was the case in *Indian Towing*, and is also the case here. The authority of the FHLBB and FHLB-Dallas to take the actions that were taken in this case, although not guided by regulations, is unchallenged. The FHLBB and FHLB-Dallas officials did not have regulations telling them, at every turn, how to accomplish their goals for IASA; this fact, however, does not automatically render their decisions discretionary and immune from FTCA suits.[4] Only policy oriented decisions enjoy such immunity. *Berkovitz* at ——, 108 S.Ct. at 1959, 100 L.Ed.2d at 541; *Varig*, 467 U.S. at 814, 104 S.Ct. at 2764. Thus, the FHLBB and FHLB-Dallas officials were only protected by the discretionary function exception until their actions be-

[4] Judge Brown made this same point in a concurrence in *Collins v. United States*, 783 F.2d 1225 (5th Cir.1986): "[e]very act of a rational being involves some choices—speed up or slow down, turn right or left, put helm port or starboard, go full astern or full ahead, tighten brakes or replace them, glide in or circle, use general anesthetic or local, use a human heart or a JARVIK 7. It is plain that the discretionary function exception of § 2680(a) must be applied with restraint if the Tort Claims Act is to achieve the dual purposes which motivated its enactment." *Id.* at 1233-34.

came operational in nature and thus crossed the line established in *Indian Towing*.

We discussed the discretionary function exception recently in *B & F Trawlers, Inc. v. United States*, 841 F.2d 626 (5th Cir.1988). In that case, the Coast Guard seized a ship at sea after discovering marijuana on board. While the ship was being towed into port, a fire broke out on board; once in port, the ship was intentionally sunk. Denying the ship owner relief pursuant to the discretionary function exception, this court held that, because the Coast Guard's purpose in towing in the ship was to protect the general public and not the ship owner, the ship owner could not have relied on the Coast Guard to his detriment. Stated another way, the Coast Guard owed no duty of due care to the ship owner since the Coast Guard's actions were not designed to benefit the ship owner.

B & F Trawlers is distinguishable from the present case in that the federal regulators here had two discrete purposes in mind as they commenced day-to-day operations at IASA. First, they sought to protect the solvency of the savings and loan industry at large, and maintain the public's confidence in that industry. Second, they sought to preserve the assets of IASA for the benefit of depositors and shareholders, of which Gaubert was one. Because any actions benefitting the first aim would necessarily further the second, Gaubert as shareholder and guarantor falls within the pool of beneficiaries of government action here. The *B & F Trawlers* rule is therefore inapposite.

We now must apply the *Indian Towing* test to the factual allegations of Gaubert's complaint to determine at which point the federal officials lost their § 2680(a) immunity. Clearly, the decision to merge

IASA with Investex and seek a neutralization agreement from Gaubert was a policy oriented decision protected by § 2680(a). *See* ¶¶ 12-19 of Amended Complaint. Similarly, the decision to replace the IASA Board of Directors with FHLBB approved persons, and the actions taken to effectuate that decision, are protected under the discretionary function exception. *See* ¶¶ 20-32 of Amended Complaint. The point at which the FHLBB and FHLB-Dallas began to assume operational control, and thus lost the protection of § 2680(a), occurred when they began to advise IASA management and participate in management decisions, including hiring a consultant, directing that IASA convert to a federally-chartered entity, supervising the filing of litigation on behalf of IASA, and other allegations contained in ¶¶ 33-43 of Gaubert's Amended Complaint. We therefore conclude that the district court's dismissal with regard to ¶¶ 12-32 of the Amended Complaint was correct, but that it should not have dismissed ¶¶ 33-43 of the Amended Complaint, as those paragraphs allege negligent operational activities, liability for which is not barred by the discretionary function exception to the FTCA.

Standing

The government argues that, even if there exists a cause of action against it under the FTCA, that cause of action belonged to the corporation, and Gaubert as an individual shareholder does not have standing to assert it.[5] Gaubert is suing in his individual capacity, and does not sue derivatively in the name of the corporation.[6]

[5] The government raised this standing challenge in the district court, but the district court did not address the issue because it dismissed Gaubert's claim on other grounds. We have sufficient information in the record on appeal only to allow us to resolve part of this issue.

Generally, individual shareholders have no separate right to sue for damages suffered by the corporation which result solely in the diminution of the

[6] Gaubert argues on appeal that, in a prior and separate case arising from the same facts, a district court held that he did not have standing to sue derivatively in the name of IASA. *Gaubert v. Hendricks*, 679 F.Supp. 622 (N.D.Tex. 1988). If this court holds that Gaubert does not have standing to sue individually, Gaubert stresses, we will have effectively precluded any sort of review of federal regulatory action. This point is incorrect. Gaubert's prior derivative suit was filed in the name of IASA against officers and directors of IASA. The court held that Gaubert would have had standing to sue prior to the IASA being placed in receivership, had he made sufficient demand on the directors or alleged demand futility. However, once IASA was placed into receivership, FSLIC acquired the right to bring that suit under 12 U.S.C. § 1792(b). Gaubert did not, in that suit, allege a demand upon FSLIC.

In the case at bar, Gaubert in his individual capacity sued FHLBB, FHLB-Dallas, and FSLIC; he has not sought to bring a derivative action against the federal officials. A derivative action is not precluded when a bank is placed into receivership; rather, any demand to bring suit must be made upon the receiver or agency possessing the right to assert the corporation's claims. *Federal Deposit Insurance Corp. v. American Bank Trust Shares, Inc.*, 558 F.2d 711 (4th Cir. 1977); *Landy v. Federal Deposit Insurance Corp.*, 486 F.2d 139 (3d Cir.1973), *cert. denied*, 416 U.S. 960, 94 S.Ct. 1979, 40 L.Ed.2d 312 (1974); *Womble v. Dixon*, 585 F.Supp. 728 (E.D.Va.1983), *aff'd in part & vacated in part*, 752 F.2d 80 (4th Cir.1984). While this may entail a demand that the federal agencies sue themselves, it is also possible to allege demand futility. In this case Gaubert has not chosen this path, and therefore his argument that our decision, which denies him standing in his individual capacity for the lost value of his shares, will preclude effective review of federal banking officials must fail.

value of the corporation's shares. *Commonwealth of Massachusetts v. Davis*, 140 Tex. 398, 168 S.W.2d 216 (1943); *United States v. Palmer*, 578 F.2d 144 (5th Cir.1978). One rationale behind this prohibition rests on principles of judicial economy. A corporation can protect its shareholder's interest by suing in the corporate name, and if the suit is successful the proceeds will inure to the benefit of the corporation; this increases the value of the individual shares in proportion to the amount of the recovery. Compare this to a situation where all shareholders sue in their individual capacities, which achieves the same resultant recovery, but requires our legal system to process hundreds or thousands of suits, rather than one suit in the name of the corporation.

Another rationale for the prohibition is fairness to creditors of the corporation. Common shareholders are usually at or near the bottom of the corporate financial pecking order. First come the secured then unsecured creditors, then the bondholders in order of preference, then the preferred shareholders, and lastly the common shareholders. Any recovery for injuries to the corporation is paid into the corporation, and the various creditors, bondholders, and equity-holders are "paid" in that order. Were common shareholders allowed to sue directly and individually for damages to the value of their shares, we would be allowing them to bypass the corporate structure and effectively preference themselves at the expense of the other persons with a superior financial interest in the corporation.[7]

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[7] The Texas Supreme Court has expressed this concern regarding proper apportionment of the recovery between creditors and equity-holders. "Such actions must be brought by the corporation, not alone to avoid a multiplicity of suits by the various stockholders and to bar a subsequent suit by the corporation, but in order that the damages so recovered may be available for the payment of the corporation's creditors, and for proportional distribution to the stockholders as dividends, or for such such other purposes as the directors may determine." *Commonwealth of Massachusetts v. Davis*, 140 Tex. 398, 168 S.W.2d 216, 221 (1942).

Responding to the above concerns, most states vest the authority to pursue or decline suits for injuries to the corporation in the board of directors, and this decision is usually protected by the business judgment presumption. Texas law is especially stringent in this regard: a corporate shareholder does not have an individual cause of action for personal damages caused solely by a wrong done to the corporation. *Davis*, 168 S.W.2d at 221. However, Texas makes an exception to this general rule: a corporate stockholder may have an action for personal damages for wrongs done to him as an individual stockholder "where the wrongdoer violates a duty arising from contract or otherwise and owing directly by him to the stockholder." *Davis*, 168 S.W.2d at 222; *accord Stinnett v. Paramount-Lasky Corp.*, 37 S.W.2d 145, 149-51 (Tex.Comm'n App.1931, holding approved). Texas, however, puts stringent restrictions on this right of action:

> The [exception] is not sufficiently comprehensive to include within such suits damages arising from the wrongful acts *merely because the acts complained of resulted in damage both to the corporation and to the stockholder.* Such a suit is permitted only when the wrongs are such as to give to the stockholder personally a right of action. If the injuries complained of are such as to give to the corporation a cause of action upon

> damages occasioned to it, the stockholder has no right to bring suit therefore, but if there is a contract or other liability of which the stockholder personally is the beneficiary, the cause of action arises to him as with any other cause of action he might have under the same circumstances.

Cullum v. General Motors Acceptance Corp., 115 S.W.2d 1196, 1201 (Tex.Civ.App.—Amarillo 1938, no writ) (emphasis supplied); *also quoted in McDonald v. Bennett*, 674 F.2d 1080, 1086 (5th Cir. 1982).

Gaubert first argues that he has individual standing as a result of the neutralization agreement which he signed. The terms of that agreement recited that, in consideration of the FSLIC discontinuing its review of other transactions in which Gaubert was involved, Gaubert would not serve as a director, officer, agent or employee of IASA. Moreover, Gaubert agreed not to participate in any way in the affairs of IASA or its subsidiaries, and not to vote the common stock that he owned. The agreement expressly reserved to Gaubert, however, the right to sell all or part of his shares. As a result of this agreement, Gaubert argues that he was prevented from protecting his agreement at the very time federal officials began to assume day to day control over IASA, and as a result he suffered unique injury separate and distinct from all other IASA shareholders.

We find this standing argument unpersuasive. While this court, for the purpose of review, accepts Gaubert's factual allegations as true, we differ with his characterization of their legal import. The neutralization agreement was a contract, supported by adequate consideration. Gaubert has not alleged in

his complaint a breach of that contract, fraudulent inducement, or any other set of facts which would give him a *personal* cause of action based on the agreement, *separate and apart* from his FTCA allegations against FHLBB and FHLB-Dallas. Gaubert suffered no injury as a result of the neutralization agreement that was not suffered by all the other IASA shareholders—the loss of the value of their shares. This being the case, Texas law does not permit Gaubert an individual cause of action against the FHLBB and FHLB-Dallas. Moreover, Gaubert was not required to sit idly by while FHLBB and FHLB-Dallas officials ran his bank into the ground: at all times, he had the ability, which was expressly reserved in the neutralization agreement, to sell his shares at market value and invest the proceeds elsewhere. We therefore conclude that the neutralization agreement does not give Gaubert standing as an individual to recover the lost value of his shares, and therefore dismiss Gaubert's action in that regard for lack of standing.

Gaubert has also alleged that the guarantee agreement, which he was "required" to sign in order to effectuate the merger, gives him an independent cause of action. Gaubert pledged property valued at about $25 million, which he ultimately lost when the IASA's financial situation deteriorated. Gaubert may have a personal cause of action against FHLBB, FHLB-Dallas, and FSLIC for causing the deterioration of IASA resulting in the loss of his property under the guarantee agreement. Unfortunately, we do not have sufficient information in the record to allow us to pass on whether Gaubert has a cause of action in this regard, as it may depend on whether there was an express or implied promise as part of the guarantee that the federal officials would not negli-

gently cause the deterioration of the corporation. We therefore remand Gaubert's action for loss of property valued at $25 million to the district court to determine whether a valid claim is presented. As a point of clarification, if Gaubert is found by the district court to have a cause of action for the lost property, he may not use that cause to assert standing to sue for the $75 million lost value of his shares.

Conclusion

The order of the district court with regard to subject matter jurisdiction is AFFIRMED IN PART and REVERSED IN PART. Gaubert's claim for the lost value of his shares is DISMISSED for lack of standing, and his claim for $25 million in lost property is REMANDED for further consideration.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CA 3-87-2989-T

THOMAS M. GAUBERT, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

ORDER GRANTING MOTION TO DISMISS

[Filed Sept. 28, 1988]

On May 10, 1988, Defendant filed its Renewed Motion to Dismiss.

Plaintiff filed his Amended Complaint on April 11, 1988. In the complaint, Plaintiff seeks to hold Defendant United States liable for the actions of the Federal Home Loan Bank of Dallas (FHLB-Dallas), the Federal Home Loan Bank Board (FHLBB), and the Federal Savings and Loan Insurance Corporation (FSLIC) (collectively referred to as "the Agencies"). Plaintiff alleges that with the assistance of the FHLBB and the FSLIC, the FHLB-Dallas assumed the duty of day-to-day management of Independent American Savings Association (IASA) and that it was negligent in carrying out that duty. It is Plaintiff's theory that the FHLB-Dallas assumed the duty of care in selecting directors and

officers to run IASA, that it breached that duty and caused IASA to fail, and that IASA, its directors, officers, and shareholders relied on the officers and directors whom the FHLB-Dallas had chosen.

Plaintiff alleges that he was the largest shareholder of IASA and that he lost the total value of his shareholder investment in addition to property worth $25 million when the FHLB-Dallas negligently caused IASA to become insolvent, and seeks $100 million in damages.

Defendant moves to dismiss on the ground that 1) Plaintiff lacks standing to sue and 2) this Court lacks subject matter jurisdiction. Because Defendant's second ground is clearly dispositive of the issues in this case, the Court shall address that ground first.

Generally, in a suit against the federal government, the plaintiff must overcome the bar of sovereign immunity. *Ellis v. Naval Air Rework Facility*, 404 F. Supp. 377 (N.D.Cal. 1975). The Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346(b), authorizes suits against the United States for "injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

That act, however, contains certain exceptions to the federal government's waiver of sovereign immunity. One of these exceptions, which Defendant contends is applicable here, is known as the "Discretionary Function Exception." That exception is found in 28 U.S.C. § 2680(a), and states:

> The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> (a) any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

Defendant contends that the regulation of the national savings and loan industry is a discretionary function and as such falls within the foregoing exception to the FTCA. Although Defendant does not cite the Court to the source of the Agencies' discretionary authority, the Court is of the opinion that 12 U.S.C. § 1464 grants broad discretionary authority to the FHLBB to regulate the savings and loan industry.

The majority of the agencies' actions about which Plaintiff complains, however, are actions which the Agencies took before formally placing IASA in receivership. Specifically, Plaintiff alleges that the Agencies sought and obtained Plaintiff's "voluntary temporary" removal from IASA; required him to personally guarantee that the net worth of IASA not fall below regulatory minimums; suggested that Plaintiff contribute his personal interest in some property valued at $25 million to the merger and acquisition transactions which the Agencies engineered between IASA and another Texas savings and loan; assisted IASA in completing the merger and acquisition; engineered the replacement of IASA's manage-

ment and board of directors; told IASA's board of directors that if it did not cooperate with the replacement plan that FHLB-Dallas would close IASA; and replaced IASA's management with unqualified, incompetent people who caused IASA's financial ruin.

All of these actions, Plaintiff alleges, were taken at a time when IASA was not in receivership or under any supervisory agreement with the Agencies and while there were no federal regulatory consent agreements or cease and desist orders in effect. Essentially, Plaintiff argues, the Agencies had no legal authority to demand any directorship or management changes at IASA and they went beyond their normal regulatory role by participating and becoming the *de facto* decision-makers for the operations of IASA. In so doing, Plaintiff contends that the Agencies' actions were outside their statutory responsibility, and that once they assumed the day-to-day affairs and operations of IASA, the Agencies also assumed the duty of exercising due care in conducting those operations. The failure to exercise due care, Plaintiff asserts, is actionable negligence under the FTCA.

The Court notes that the majority of Plaintiff's complaints regard actions which the Agencies induced Plaintiff or IASA's board of directors to take, upon threat of being placed in receivership. As the Court discusses below, the Agencies would have been within their discretionary authority to place IASA in receivership. If Plaintiff had objected to the actions which the Agencies were taking in lieu of placing IASA in receivership, Plaintiff could have refused to cooperate and allowed the Agencies to carry out their threat of receivership. The fact that Plaintiff cooperated when he could have refused will not give Plaintiff a cause of action where he otherwise would have none.[1]

It is undisputed that had the Agencies exercised their discretionary authority to place IASA in receivership when they began their examination of IASA in late 1984, their decision to do so would have fallen within the discretionary function exception to the FTCA. It follows, then, that the Agencies had the discretionary authority to *not* place IASA in receivership in 1984, i.e. the Agencies had the discretionary authority not to act. It appears that when the Agencies exercised their discretionary authority not to act, they attempted to obtain acquiescence to their management of IASA outside the regulatory scheme. The question is, then, whether the Agencies will incur liability under the FTCA for taking the actions they did, in lieu of placing IASA in receivership. This Court considers those actions to be an extension of the Agencies' discretion not to place IASA in receivership in 1984.

The statutory waiver of sovereign immunity found in the FTCA must be construed strictly and in such a way as to favor the sovereign. *Shubert Construction Co., Inc. v. Seminole Tribal Housing Authority*, 490 F. Supp. 1008 (S.D.Fla. 1980). If the FTCA does not contain an explicit waiver of sovereign immunity for a particular action, none exists. Therefore, for acts performed as an extension of a discretionary act to be considered non-discretionary and actionable under the FTCA, the FTCA must explicitly waive sovereign immunity for those acts. Otherwise, acts taken in extension of a discretionary func-

[1] The Court notes that under 12 U.S.C. § 1464(d)(6)(A), IASA could have brought an action seeking the removal of a wrongfully appointed receiver.

tion fall in the safety net created by the discretionary function exception, and are not actionable.

Upon examination of the FTCA and the discretionary function exception, the Court finds that there is no provision which renders acts taken as an extension of a discretionary function actionable under the FTCA. Because no explicit waiver of sovereign immunity has been created for such acts, the Court finds that none exists. Therefore, Plaintiff cannot maintain his action under the FTCA against the sovereign.

In conclusion, this Court is of the opinion that the actions of which Plaintiff complains fall within the discretionary function exception to the FTCA and therefore this Court does not have subject matter jurisdiction over his claims.

It is therefore ORDERED that Defendant's motion to dismiss is granted.

Signed this 28 day of September, 1988.

/s/ Robert B. Maloney
ROBERT B. MALONEY
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CA 3-87-2989-T

THOMAS M. GAUBERT, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

JUDGMENT

This action came on for trial before the Court on Defendant's Motion to Dismiss, Honorable Robert B. Maloney, District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is ORDERED and ADJUDGED that Plaintiff's complaint be dismissed.

Signed this 28 day of September, 1988.

/s/ Robert B. Maloney
ROBERT B. MALONEY
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-1923

D.C. Docket No. CA3-87-2989-T

THOMAS M. GAUBERT, PLAINTIFF-APPELLANT

versus

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

Appeal from the United States District Court for the Northern District of Texas

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Before GEE, GARZA, and JONES, Circuit Judges.

[Entered Oct. 17, 1989]

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from in this cause is affirmed in part and reversed in part, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court. IT IS FURTHER ORDERED that

Gaubert's claim for the lost value of his shares is dismissed for lack of standing, and his claim for $25 million in lost property is remanded for further consideration.

IT IS FURTHER ORDERED that each party bear its own costs on appeal.

October 17, 1989

ISSUED AS MANDATE: Jan. 16, 1990

OP-JDT-11

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-1923

THOMAS M. GAUBERT, PLAINTIFF-APPELLANT

versus

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

Appeal from the United States District Court
for the Northern District of Texas

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC
(Opinion October 17, 5 Cir., 1989, —— F.2d ——)
(January 5, 1990)

Before GEE, GARZA, and JONES, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Thomas Gibbs Gee
THOMAS GIBBS GEE
United States Circuit Judge

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